

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KATHERINE ELIZABETH  
NEIMER, a minor, by and through  
JAMES J. NEIMER and REBECCA  
NEIMER, her parents and natural  
guardians,

Plaintiffs,

v.

THE DISTRICT OF LANCASTER  
SCHOOL BOARD, et al.,

Defendants.

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: Docket No: 02-CV-4034  
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: Consolidated with No. 03-CV-5922  
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: JURY TRIAL DEMANDED  
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**REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION  
TO PRECLUDE DR. STEVEN SAMUEL FROM TESTIFYING**

By Motion dated December 15, 2003, defendants the Board of School Directors of the School District of Lancaster, Arthur Mann, Arthur Dodge, III, Daniel Desmond, Gina Brown, Peter Horn, Patrice Dixon, Michael Rowan, Helen Duncan, Michael Winterstein, Margaret Aulisio, Dianna King, William Way, Sue Stathopoulos, and Karen Ward (collectively referred to as "the School defendants") moved to preclude plaintiffs James Neimer, Rebecca Neimer and Katherine Neimer ("plaintiff Neimer") from presenting at trial the testimony of their second proposed expert, Dr. Steven Samuel ("Motion to Preclude"). On December 19, 2003 plaintiffs filed an Opposition to the Motion to Preclude ("Plaintiffs' Opposition"). Through their Opposition, plaintiffs discount the applicability of bad faith considerations to a Rule 37 motion, and argue, instead, that their delay in identifying Dr. Samuel was "justified" (Plaintiffs' Opposition, pp. 3-4) and that the School Defendants were not prejudiced by this belated identification.

**ARGUMENT**

The notion that bad faith is not a factor for this Court's consideration rests on *PPG Industries, Inc. v. Zimwin*, 2002 WL 31289285, Nos. 01-4417, 00-4491 (3<sup>d</sup> Cir. 2002), which plaintiffs contend stands for the proposition that the district court may *only* consider prejudice in determining whether to preclude

expert testimony. Notably, plaintiffs rely on *PPG Industries* even though it was designated by the Circuit Court as non-precedential.<sup>1</sup>

Moreover, *PPG Industries* does not stand for the proposition that bad faith is not a consideration in a Rule 37(c)(1) motion. The *PPG Industries* Court merely explained the different considerations it weighs when the issue on appeal is the District Court's decision to exclude evidence as a sanction under Rule 37 as contrasted with the District Court's decision not to exclude evidence under that rule. Contrary to plaintiffs' characterization, *PPG Industries* does not hold that a District Court is *prohibited* from examining bad faith when considering a Rule 37(c)(1) motion. To the contrary, *PPG Industries* relies on *Newman v. GHS Osteopathic*, 60 F.3d 153, 156 (3<sup>d</sup> Cir. 1995), which specifically considered bad faith and expressly found that "there was no reason to believe that [the non-moving party] acted in bad faith..." Moreover, cases since *PPG Industries* make clear that district courts *should* consider the *Pennypack* factors<sup>2</sup> in deciding whether to impose Rule 37 sanctions, including bad faith or willfulness in failing to comply with the district court's orders. See *Astrazenica AB v. Mutual Pharmaceutical Co.*, 278 F. Supp. 2d 491, 504 (E.D. Pa. 2003); *Gallup, Inc. v. Kenexa Corp.*, 2003 U.S. Dist. Lexis 9821, \*6-7, C.A. No. 00-5523 (E.D. Pa., May 30, 2003); *Philadelphia Cervical Collar v. Jerome Medical*, 2003 U.S. Dist. Lexis 6572, \*10, C.A. No. 00-2515 (E.D. Pa., April 1, 2003); *Borden v. Ingersoll-Rand Co.*, 2003 U.S. Dist. Lexis 1272, \*7, C.A. No. 01-5455 (E.D. Pa., Jan. 17, 2003).

The bad faith present here compels the conclusion that Dr. Samuel should be precluded from testifying at trial. Plaintiffs' entire justification for proffering Dr. Samuel at this late date is plaintiff

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<sup>1</sup> The Third Circuit Court of Appeals does not cite its non-precedential opinions as authority. Third Circuit Internal Operating Procedure 5.7; *United States v. Singh*, 224 F. Supp. 2d 962, 965 n.5 (E.D. Pa. 2002). In fact, the Third Circuit Internal Operating Procedures describe a non-precedential opinion as one having "value only to the trial court or the parties." Third Circuit Internal Operating Procedure 5.3.

<sup>2</sup> Those factors are: (1) the prejudice or surprise in fact of the party against whom the excluded witness would testify; (2) the ability of that party to cure the prejudice; (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case; and (4) bad faith or willfulness in failing to comply with the Court's order. *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 905 (3<sup>d</sup> Cir. 1977), *overruled on other grounds*, *Goatman v. Lukins Steel Co.*, 777 F.2d 113 (3<sup>d</sup> Cir. 1985). These same factors appear in *In re TMI Litigation*, 193 F.3d 613 (3<sup>d</sup> Cir. 1999).

Neimer's supposed reaction to Alvarez "confronting" her on October 28, 2003. Specifically, plaintiffs' counsel describes the encounter between Alvarez and plaintiff Neimer on October 28 as one during which (1) plaintiff Neimer reacted by "shaking, crying and clutching her mother after spending very little time in the courtroom in Alvarez' presence;" (2) plaintiff Neimer was in "torment;" and (3) plaintiff Neimer was "plagued with an overwhelming desire to run away the entire time the parties awaited commencement of the trial." Plaintiffs' Opposition, p. 4. Plaintiffs' counsel says that upon observing and being advised of plaintiff Neimer's response, he rushed to the telephone and reached Dr. Samuel -- a total stranger to the proceedings and to plaintiff Neimer -- who opined that two trials would put plaintiff Neimer "over the top" psychologically. Plaintiffs' Opposition, p. 4.

Plaintiffs' counsel's rendition of the October 28 encounter between plaintiff Neimer and Alvarez stands in stark contrast to how her parents described what really happened that day. During her deposition on December 23, 2003, plaintiff Neimer's mother explained her daughter's reaction to first seeing Alvarez as follows:

- plaintiff Neimer saw Alvarez in the courthouse as he was getting off an elevator;
- plaintiff Neimer was surprised to see Alvarez;<sup>3</sup>
- plaintiff Neimer cried but her mother was able to calm her down;
- after she was calmed down, plaintiff Neimer was taken into the courtroom;
- plaintiff Neimer was "uncomfortable" while sitting in the courtroom; and
- plaintiff Neimer described seeing Alvarez as "hard," "difficult" and a "challenge."

A copy of an excerpt of Rebecca Neimer's deposition transcript is attached hereto as Exhibit 1.

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<sup>3</sup> According to Mr. Neimer, they did not have sufficient time to prepare plaintiff Neimer for the trial, and a possible encounter with Alvarez, because they did not learn until the afternoon of October 27 that the case was going to trial the next day. See Exhibit 2. Mr. Neimer testified that had they had prior notice of the trial they "probably would have made arrangements for her to see Ms. Hosterman one time prior to that." Plaintiffs should not be allowed to capitalize on plaintiff Neimer's surprise at seeing Alvarez for the first time when it was caused by their own counsel's failure to prepare them properly for the trial.

Plaintiff Neimer's father's recollection of the events of October 28<sup>th</sup> are also different than the summary of the events set forth in Plaintiffs' Opposition and, apparently, recounted to this Court, on October 28. James Neimer testified that:

- plaintiff Neimer and her mother saw Alvarez in the courthouse hallway, plaintiff Neimer began to cry, and before Mr. Neimer could turn around, Mrs. Neimer had taken plaintiff Neimer into a side room to calm her down;
- plaintiff Neimer seemed to calm down and was brought into the courtroom after Alvarez had entered;
- plaintiff Neimer was seated at a table across from Alvarez;
- plaintiff Neimer was "uncomfortable" sitting in the courtroom with Alvarez and avoided looking at him;
- plaintiff Neimer seemed "more confident the longer we were in the courtroom"; and
- afterwards, plaintiff Neimer said that while she was uncomfortable and "wouldn't have been happy about taking the stand and saying what I would have had to say in front of all those people about what happened because it's embarrassing" she "could have done it."

A copy of an excerpt of James Neimer's deposition transcript is attached hereto as Exhibit 2. None of these descriptions comes close to demonstrating the "tremendous emotional pain" plaintiffs' counsel apparently described to this Court on October 28, or to Dr. Samuel via the telephone, both of which are summarized in Plaintiffs' Opposition. Plaintiffs' Opposition, pp. 4, 6. Indeed, plaintiff Neimer was never "confronted" by Alvarez but unexpectedly ran into him in the elevator lobby of the Courthouse.

There is also no testimony that plaintiff Neimer had an "overwhelming desire to run away the entire time the parties awaited the commencement of trial," or that she was "shaking" and "crying" in the courtroom and/or otherwise "tormented" by the encounter. To the contrary, plaintiff Neimer's parents testified that she composed herself after seeing Alvarez, and although "uncomfortable" about having to tell her story to a group of strangers, had readied herself to do so.

Of course, even if the recitation of facts concerning plaintiff Neimer's reaction was true, plaintiffs fail to explain how these "facts" justify the identification of Dr. Samuel four months after the deadline

imposed by this Court and well outside the time requirements of Rule 26. Assuming plaintiff Neimer reacted negatively to seeing Mr. Alvarez for the first time since December 2000, it would seem logical to seek additional psychological treatment for plaintiff Neimer from her treating psychologist, not to obtain a new, second expert to address the alleged "psychological damage inflicted upon Katie by Alvarez' attack," especially since that is the subject of plaintiffs' original expert's opinion. Indeed, there is no explanation for how plaintiff Neimer's supposed reaction warrants an expert **who had never before examined or even met her**. There is also no excuse offered for why this evaluation could not have been obtained within the time period designated by the Court or under Rule 26.

It is equally stunning that Dr. Samuel "opined" over the telephone on the effect of two trials on plaintiff Neimer "due to the nature of the injury and Katie's manifest unresolved psychological issues" when Dr. Samuel had never even met plaintiff Neimer! The only reasonable conclusion -- which plaintiffs do not dispute -- is that plaintiffs' counsel had discussed this case with Dr. Samuel before the October 28 telephone call and was poised to designate him as an expert once this Court was persuaded to further delay the trial.<sup>4</sup> Notably, plaintiffs do not cite any cases to support the proposition that the mere desire to augment expert testimony constitutes "substantial justification" under Rule 37.

It is equally obvious that the School defendants will be prejudiced by the eleventh hour addition of Dr. Samuel as an expert. As explained in the Motion to Preclude, the School defendants were given eight weeks from the commencement of Case #3 to: (1) retain counsel; (2) move to dismiss Case #3; (3) conduct all discovery they needed; (4) mediate this dispute; and (5) prepare for trial. With all that had to be completed in the time allotted, and the delays attributable to the plaintiffs, the School defendants were not able to obtain the plaintiffs' testimony until the last two days of the eight week period-December 22 and 23, 2003. Clearly, the School defendants did not have an opportunity to designate an expert to counter concerns raised by Dr. Samuel, none of which seemed to present themselves until after this Court

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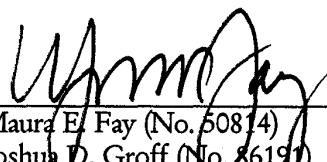
<sup>4</sup> The School defendants assume plaintiffs want to replace their original expert because she opined that plaintiff Neimer "ha[d] no diagnosable psychological disorder." Tellingly, plaintiffs do not contest this conclusion in their Opposition.

agreed to put off the trial.<sup>5</sup> As such, the School defendants' defense will be severely prejudiced if plaintiffs' last minute attempt to change their theory and amount of damages is not rejected by this Court. Because plaintiffs' belated designation of Dr. Samuel is not harmless, Rule 37 requires that plaintiffs be precluded from using him as a witness at trial. Fed. R. Civ. P. 37(c)(1).

### CONCLUSION

For all the foregoing reasons, as well as those set forth in the School defendants' Motion to Preclude Dr. Steven Samuel from Testifying, the School defendants pray for an Order precluding Dr. Samuel from testifying as an expert witness for plaintiffs in their cases.

Respectfully submitted,

  
 Maura E. Fay (No. 50814)  
 Joshua D. Groff (No. 86191)  
 DILWORTH PAXSON LLP  
 3200 Mellon Bank Center  
 1735 Market Street  
 Philadelphia, PA 19103  
 215-575-7000

DATED: December 30, 2003

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<sup>5</sup> Whether or not plaintiffs offered to make Dr. Samuel available for deposition is beside the point. In fact, plaintiffs initially offered to make Dr. Samuel available for deposition as a way of avoiding a deposition of Ms. Hosterman. See Exhibit B to Plaintiffs' Opposition. By way of response, plaintiffs' counsel was advised that the deposition of Dr. Samuel was not a priority for the School defendants. See Exhibit 3 hereto. Indeed, deposing Dr. Samuel would have only used up time the School defendants otherwise needed to prepare for trial. Under no circumstances would deposing Dr. Samuel have changed the fact that the School defendants did not have time to obtain an expert to counter Dr. Samuel's opinions. Importantly, plaintiffs never address the prejudice caused to the School defendants by the lack of an opportunity to designate an expert.

## **EXHIBIT 1**

1 And I think she didn't have time -- you know, it  
2 was -- we just ran into him. He was getting off  
3 the elevator. So there wasn't -- it was just kind  
4 of like "boom," all of a sudden and I don't think  
5 she expected it to be -- if she was going to run  
6 into him that it would be that way. She was  
7 upset. Cried. So I took her to the side and  
8 provided support.

9 Q. Did you calm her down?

10 A. Yes.

11 Q. Did she stop crying?

12 A. Yes.

13 Q. Anything else you can tell me about  
14 her reaction?

15 A. She talked about it a little bit  
16 later. You know it was hard. Mostly, it was  
17 difficult.

18 Q. Did you then take her into the  
19 courtroom itself?

20 A. Yes. We were directed to do that.

21 Q. Did she see Mr. Alvarez in the  
22 courtroom as well?

23 A. I'm sure she did. He was there.

24 Q. Did she react at all when she saw



1 him in the courtroom?

2 A. She felt uncomfortable. There was  
3 an uncomfortable -- I think she felt safe because  
4 we were there to protect her and, you know, I  
5 think just kind of helping her in the hallway.

6 Q. Is there anything else you remember  
7 about Katie's reaction when she saw Mr. Alvarez  
8 either the first time or the second time?

9 A. Are you talking about outside the  
10 courtroom the first time.

11 Q. Exactly. I'm segregating the  
12 hallway encounter which, as I understand, is the  
13 first encounter, and then later seeing him in the  
14 courtroom. Are these the only two times she saw  
15 him that day?

16 A. I believe so.

17 Q. Okay.

18 A. You know, maybe on the way out he  
19 was walking down the road or something. I don't  
20 recall specifically. Just -- it was very  
21 difficult for her. It was a challenge. And, you  
22 know, I think just talking to her and trying to  
23 provide her with additional support, and helping  
24 here to work through that; and then I think Jim

1 and I being there and her not being right up next  
2 to him and not having to look at him. I tried to  
3 place myself so that she wouldn't have to face  
4 him.

5 Q. After the trial was called off, I'll  
6 call it on that day that you were in court -- you  
7 remember the trial didn't go forward; right?

8 A. Yes.

9 Q. Did Katie talk to you at all about  
10 seeing Mr. Alvarez?

11 A. She did talk about that it was hard;  
12 that it was difficult for her to see him there.  
13 But again I tried not to press it and bring it up.  
14 I'm more than willing to talk about it when she  
15 brings it up to me, which she did bring it up and  
16 said how it was hard and a challenge.

17

18 END OF THE PAGES

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20 Q. Is Katie on any medications  
21 presently?

22 A. No.

23 Q. Knee the me yesterday <WHAOE> saw  
24 <TKRFPLTD> Sam <WUL>. <SHOEFS> on <AEPBT> bake Z

## **EXHIBIT 2**

1 Q. Did she ever draw your attention to  
2 the fact that leaving in the middle of the day or  
3 during the school day was drawing attention to  
4 her?

5 A. Not that I remember. We would  
6 schedule them as close as we could to the end of  
7 the school day, so she would just have to leave a  
8 little bit early. And I don't know if she was  
9 ever questioned about it.

10 Q. It wasn't something that came up in  
11 your conversations with her?

12 A. Not that I remember.

13 Q. Now Katie was reseen by Ms.  
14 Hostermann in June of this past year or this year;  
15 is that right?

16 A. Yes.

17 Q. Why was that done?

18 A. It was in preparation for the  
19 deposition. We didn't really know what we would  
20 be walking into. So we wanted her to have a  
21 session with Ms. Hosterman just prior to the  
22 deposition and to sort of help her prepare. I  
23 mean we could do -- my wife and I could do certain  
24 things to prepare her for it but we wanted to have

1 a professional involved also.

2 Q. Did you consider having a similar  
3 session for Katie scheduled right before the  
4 trial?

5 A. Are we talking about -- I'm a little  
6 confused by your question. Are we talking about  
7 the criminal end or the civil end?

8 Q. No, the civil trial. And I agree  
9 with you, it's a confusing question. So let me  
10 back up. As I understand it, the original case  
11 that was instituted on Katie's behalf was to try  
12 on October 28th. And I think you all appeared at  
13 the courthouse for the beginning of the trial. My  
14 question is prior to October 28th, was there an  
15 effort made or a contemplation of having Katie  
16 examined by Ms. Hostermann before that trial?

17 A. We only had real short notice that  
18 the Katie was -- we were going to be going for  
19 that. We went down for the settlement conference  
20 and we were made aware that the trial was going to  
21 go the next morning. So there was no time to set  
22 that up or we probably would have made  
23 arrangements for her to see Ms. Hosterman one time  
24 prior to that. It was too short of a notice to

1       set up an appointment.  
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1           Q.       Had you been advised by prior  
2       counsel that the case was going to try in  
3       September?

4           A.       I don't think we were ever made  
5       aware of that.

6           Q.       I've asked your wife some questions  
7       about when Katie first saw Mr. Alvarez on that  
8       morning of October 28th. Is her description of  
9       what happened in any way different from your  
10      recollection?

11          A.       I don't remember exactly. I'm  
12      probably better to try to say it -- it may be the  
13      same -- it may be the same thing. I remember I  
14      was walking with Mr. Bily and we were probably  
15      three or four strides ahead of Becky and Katie.  
16      And Katie saw Alvarez and she immediately started  
17      crying. And Becky saw the reaction and took her  
18      off to like the side of the hallway. I think she  
19      might have actually gone in a conference room.  
20      And I kind of turned around and they were gone. I  
21      heard Katie crying. By the time I turned around,  
22      they were gone. And then I was -- Mr. Bily and I  
23      were talking about something else. I'm trying to  
24      remember exactly what it was.

1           Q.       I don't want to know what you talked  
2       about with your lawyer.

3                   MR. BILY:  If it's material.

4           A.       Yes, we were talking about something  
5       and they were just a couple strides behind and as  
6       I saw her crying she was gone.

7                   I turned around.  I said, Okay I  
8       know exactly -- here's Alvarez.  There is Katie.  
9       I heard the crying.  She is off into the other  
10      room with Becky.  Becky noticed that much before I  
11      did, and took her off into the room, for lack a  
12      better word.  I don't know whether they call it --  
13      there was a side room there.  She took her in  
14      there to kind of so she wouldn't have to look at  
15      him.

16          Q.       Anything else about that encounter  
17      that you remember?

18          A.       And Becky tried to calm her down.  I  
19      talked with Mr. Bily and meantime Alvarez went  
20      into the courtroom with his counsel.  And then we  
21      went back out and got Becky and Katie and they  
22      came in and sat down down at one table and Alvarez  
23      was seated at a table across the room.

24                   She seemed to calm down a little



1 bit. You can tell she didn't want to look at him.  
2 She sat there at a table with myself and Becky and  
3 he was seated off to her right. And she really  
4 didn't look his way in the room. She looked  
5 straight and she didn't want to look over at him.

6 She didn't verbalize that but you  
7 could tell by her body language that she was  
8 uncomfortable being in the same room with him,  
9 after what had happened.

10 Q. I'm sure you weren't very  
11 comfortable either?

12 A. No, I wasn't.

13 Q. Anything else about that encounter  
14 that you want to tell me about?

15 A. She seemed to be more confident the  
16 longer that we were in the courtroom and in fact  
17 she made a point of telling me after everything  
18 was over that day: Dad, I really felt  
19 uncomfortable in the courtroom, but I wouldn't have  
20 been happy about taking the stand and saying what  
21 I would have had to say in front of all those  
22 people about what happened because it's  
23 embarrassing but she said, you know what, if I had  
24 to to do it I could have done it.

### **EXHIBIT 3**

# DILWORTH PAXSON LLP

LAW OFFICES

DIRECT DIAL NUMBER:  
215-575-7252

Maura E. Fay  
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November 20, 2003

## VIA TELECOPY

Raymond M. Bily, Esquire  
Reiff and Bily  
1429 Walnut Street, 12<sup>th</sup> Floor  
Philadelphia, PA 19102

**RE: Neimer v. The District of Lancaster School Board, et al.  
02-CV-4034; 03-CV-5922**

Dear Mr. Bily:

By letter received this morning you advised me that you could produce the Neimers for deposition on Monday, November 24, and that you were able to make Dr. Samuel available on either December 2 or 17, 2003.

While I do not purport to speak for the other counsel in this matter who, for some reason, were not copied on your letter to me, I am writing to advise you that I am not available to take the Neimers' depositions next Monday. Please advise me whether or not the Neimers can make themselves available on December 4 as noticed. If not, please provide me and the other defense counsel with alternate dates on which the Neimers would be available to be deposed.

Your suggestions regarding Dr. Samuel are also unresponsive to my notice for Ms. Hosterman's deposition. First, neither your letter of November 12, 2003, nor the letter received this morning, state that you are withdrawing Ms. Hosterman as an expert witness. Second, and as stated in my letter to you of November 13, 2003, your identification of Dr. Samuel is four months too late. Third, whether or not you intend to call Ms. Hosterman, she was Katherine Neimer's treating psychologist for nine months. As such, Ms. Hosterman is a fact witness. If your letter was meant to advise me that you will not produce Ms. Hosterman voluntarily, that is fine. Please clarify your position on this immediately so I can issue a subpoena to Ms. Hosterman to appear on December 8.

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Dilworth Paxson LLP

Page 2

To: Raymond M. Bily, Esquire

Lastly, be advised that I have not yet decided whether or not I wish to depose Dr. Samuel. Out of an abundance of caution I suggest you advise Dr. Samuel to keep December 17 open for this purpose. If I decide to proceed with that discovery I will issue a notice of deposition for the 17<sup>th</sup>.

Very truly yours,

  
Maureen E. Fay

c: Christopher Underhill, Esquire (via telecopy)  
Paul Lantieri, Esquire (via telecopy)  
Edward Rubenstone, Esquire (via telecopy)

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing Reply Memorandum was served this 30th day of December, 2003 on all counsel of record as indicated below:

**VIA HAND DELIVERY**

Raymond M. Bily, Esquire  
Reiff and Bily  
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